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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

## No. 729

FRED THIELE and EUGENE PANGER, Co-Partners, d/b/a TWIN TOWERS COMMISSARY,

*Respondents,*

*vs.*

CITY OF CHICAGO, a Municipal Corporation, and MARTIN H. KENNELLY, Mayor of the City of Chicago; TIMOTHY J. O'CONNOR, Commissioner of Police of the City of Chicago; and ROY T. CHRISTIANSEN, Commissioner of Buildings of the City of Chicago,

*Petitioners.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

## BRIEF FOR RESPONDENTS IN OPPOSITION.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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## BRIEF FOR RESPONDENTS IN OPPOSITION.

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### OPINIONS BELOW.

The opinions below are adequately set forth in the Petition.

### JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED.

Does the exercise of exclusive federal jurisdiction pursuant to Article I, Section 8, Clause 17, of the Constitution of the United States preclude the application of municipal licensing and zoning ordinances to a food commissary located on land subject to such exclusive federal jurisdiction?

## CONSTITUTIONAL AND STATUTORY PROVISIONS.

In addition to the constitutional and statutory provisions set forth in the Petition, Article VI, Clause 2, of the Constitution of the United States is involved.

## STATEMENT.

The respondents operate a commissary, *i. e.*, a small food shop, located in an apartment building in Chicago known as the "Twin Towers". In 1943, and prior to the erection of the building, the United States was ceded exclusive jurisdiction by the State of Illinois over the land on which Twin Towers stands, subject only to the reservation by the State of the right to serve civil and criminal process.

Twin Towers is operated under a lease between the Federal Government and Herbert S. Greenwald. It was constructed at the Government's request to provide modern living facilities for personnel assigned to duty with the Fifth Army Headquarters, which is located on part of the ceded land adjacent to Twin Towers (Abst., pp. 13-17, 25; Petition, Apps. D, E). Twin Towers houses only military and civilian personnel so assigned (Abst., pp. 14, 15). Other persons may be housed in Twin Towers only in the event that the rental units are not fully occupied by Fifth Army personnel (Add. Abst., pp. 4-7). The Federal Government requested that a commissary be included in the plans and specifications for Twin Towers (Abst., p. 14). In accord-

ance with the Government's desires, space for a commissary was leased by Greenwald to the respondents (Abst., p. 3). There is no direct entrance from the street to the commissary (Abst., pp. 4, 19).

While operating the commissary, the respondents were repeatedly served with arrest slips by the City of Chicago for failure to have a food purveyor's license. Respondents brought this action for declaratory relief in March, 1953, to prevent the petitioners from interfering with the operation of the commissary. In their pleadings, petitioners averred that the location of the commissary violated the City's zoning ordinance and for that reason a food purveyor's license could not be issued to respondents (Abst., p. 11). Both the trial court and the Supreme Court of Illinois held that the local ordinances were inapplicable (Add. Abst., pp. 14-16; Petition, App. B).

## ARGUMENT.

Respondents submit that the decision below involves merely the application of familiar principles of constitutional law and that it fully conforms with this Court's prior decisions. No novel issue of law is present.

### I.

### THE DECISION OF THE ILLINOIS SUPREME COURT IS BASED ON FAMILIAR PRINCIPLES OF CONSTITUTIONAL LAW.

The decision of the Supreme Court of Illinois is based on a long line of precedents of this Court, including *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525 (1885); *Benson* v. *United States*, 146 U. S. 325 (1892); *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439 (1929); *United States* v. *Unzeuta*, 281 U. S. 138 (1930); *Pacific Coast Dairy, Inc.* v. *Dept. of Agriculture of California*, 318 U. S. 285 (1943); *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518 (1938).

The only basis of the Petition for Certiorari herein is the claim that the facts in the case at bar are distinguishable from the *Collins* case. The petitioners have managed to find only inconsequential differences which merely re-emphasize experience's teaching that no two cases can be exactly alike. In their effort to prove the two cases "easily distinguishable", they have extended themselves to the point of creating "differences". Despite these efforts, petitioners have been unable to cite a single authority for the argument that the r[illegible] or purported differences between the *Collins* case and the case at bar require a different holding in the present case.

Implying that the *Collins* case turned on the Federal Government's status as an "active partner" in the profits of the Yosemite Park Co., petitioners ignore the established rule that the absence of a federal financial interest does not deprive the United States of exclusive territorial jurisdiction. *Benson* v. *United States*, 146 U. S. 325 (1892); *United States* v. *Unzeuta*, 281 U. S. 138 (1930); *Petersen* v. *United States*, 191 F. 2d 154 (9th Cir., 1951), *cert. denied*, 342 U. S. 885 (1951). This Court permitted state taxation and prohibited state licensing in the *Collins* case solely because it found that the United States exercised exclusive jurisdiction over the land except for California's explicitly reserved jurisdiction to tax. *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, 533-536 (1938). Moreover, this Court held, petitioners' suggestion to the contrary notwithstanding (Petition, pp. 2-3), that jurisdiction to tax does not include the power to license or regulate. *Ibid.*

Petitioners misstate the facts when they assert that the United States has leased "*all* of its land" to respondents' lessor—a fact alleged to constitute another important distinction from the *Collins* case (Petition, pp. 7-8). Petitioners' own documentary evidence establishes that Twin Towers is adjacent to the United States Army, Fifth Army Headquarters (Abst., p. 25), which, as even petitioners will admit, has not been leased to Greenwald. Furthermore, even if petitioners' assertion conformed to the facts, their argument that by leasing all of the land the Government forfeited its jurisdiction finds no support in any reported decision.

Petitioners would also be hard put to reconcile with the record their implied contention that the United States is not "actively in charge" of Twin Towers (Petition, p. 7). A number of provisions in the Twin Towers lease reserve to Army authorities wide areas of supervision, inspection and control over the building (Add. Abst., pp. 10, 11).

There is no reason to assume that the United States has failed to exercise these powers. Petitioners compound their misstatements by insinuating that respondents are motivated in this litigation by a determination to foster and perpetuate conditions of filth and contamination (Petition, p. 8). This suggestion not only attacks, without any support in the record, the integrity of respondents but also the ability of the Federal Government and the United States Army to safeguard their personnel. It is hardly conceivable that the United States, which retains full control over Twin Towers and hence over respondents' commissary, would tolerate the conditions which petitioners describe. Petitioners' apparent solicitude to protect Fifth Army personnel by means of a food purveyor's license is unconvincing in view of their position that the Chicago Zoning Ordinance precludes the issuing of such license to respondents (Abst., p. 11).

The argument made by petitioners that certain provisions in the Twin Towers lease effect a retrocession of jurisdiction (Petition, p. 9) is amply refuted in the opinion of the Supreme Court of Illinois (Petition, pp. 17-18). It should, in addition, be pointed out that the lease provisions on which petitioners rely require compliance only with "applicable" ordinances and regulations. Since the City of Chicago has no jurisdiction over land subject to exclusive federal jurisdiction, the City's ordinances are not applicable. The lease provisions cannot and do not purport to retrocede jurisdiction to the City. The lease used in this case was a standard form designed to cover both situations in which the United States does and does not exercise exclusive jurisdiction over a housing project (Abst., p. 23). See *City of Birmingham* v. *Thompson*, 200 F. 2d 505, 507 (5th Cir., 1952); *State* v. *Blair*, 238 Ala. 377, 191 So. 237 (1939). This is borne out by paragraph 3 of the lease which enjoins violation of local eviction laws "in the event

only that such law *is applicable* to housing units erected in the said military installation" (Add. Abst., p. 7, emphasis added).

Petitioners have presented nothing except immaterial and inaccurate assertions of fact in support of their petition. There has been no showing made that the decision in the case at bar constitutes the slightest departure from *Collins* v. *Yosemite Park & Curry Co.* and the other decisions of this Court on which the Supreme Court of Illinois relied.

## II.

## THE DECISION OF THE SUPREME COURT OF ILLINOIS IS ENTIRELY CONSISTENT WITH THE CASES CITED BY PETITIONERS.

Having cited a long string of cases purportedly not in accord with the decision below, the petitioners leave the assessment of their relevance to the respondents and the Court. An examination of these citations fails to disclose a single case which offers the slightest support to petitioners' argument. The cited cases fall into three categories, each of which presents a fact situation distinctly different from the present case:

### (1) Cases Involving Partial Retrocession of Jurisdiction by Congress.

In *Offutt Housing Company* v. *Sarpy County*, 351 U. S. 253 (1956), *Howard* v. *Commissioners*, 344 U. S. 624 (1953), *Fort Dix Apartments Corp.* v. *Borough of Wrightstown*, 225 F. 2d 473 (3rd Cir., 1955), *Meade Heights, Inc.* v. *State Tax Comm.*, 202 Md. 20, 95 A. 2d 280 (1953), and *Conley Housing Corp.* v. *Coleman*, 211 Ga. 835, 89 S. E. 2d 482 (1955), the holdings were merely that states

had the right to tax private persons or property located on lands subject to exclusive federal jurisdiction *if explicitly permitted to do so by acts of Congress.* In the case at bar, too, the respondents pay local taxes because Congress has so provided (Add. Abst., p. 8; Petition, p. 22). However, neither congressional retrocession nor state reservation of jurisdiction to tax authorizes the local licensing of, or control over, activities on land subject to exclusive federal jurisdiction. *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518 (1938); *City of Birmingham* v. *Thompson*, 200 F. 2d 505, 507 (5th Cir., 1952). See *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 99, 103 (1940); *Oklahoma City* v. *Sanders*, 94 F. 2d 323, 328 (10th Cir., 1938).

**(2) Cases Involving Land Not Subject to Exclusive Federal Jurisdiction.**

The following cases cited by petitioners have held that states may tax or regulate some private activities or property, despite their existing connection with certain federal functions: *Penn-Dairies, Inc.* v. *Milk Control Comm.*, 318 U. S. 261 (1943), *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941), *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558 (1946), *Graves* v. *New York*, 306 U. S. 466 (1939), *American Motors Corp.* v. *Kenosha*, 274 Wis. 315, 80 N. W. 2d 363 (1957), *People* v. *Vendome Service, Inc.*, 12 N. Y. S. 2d 183 (1939), *aff'd* 19 N. Y. S. 2d 195 (1940), *Mayor of Baltimore* v. *Linthicum*, 170 Md. 245, 183 Atl. 531 (1936). In each of these cases, however, exclusive federal jurisdiction was *not* involved. Moreover, in each case, the court specifically found that the federal function involved was not unduly hampered by the imposition of the local tax or regulation. In the present case, Twin Towers is not only subject to exclusive federal jurisdiction, but the proposed enforcement of the local ordinances would effectively deprive the Federal Government of a facility which it

specifically requires as part of a military installation. See *Leslie Miller, Inc.* v. *Arkansas*, 352 U. S. 187 (1956); *Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21 (1939); U. S. CONST. art. VI, cl. 2. In *Palmer* v. *Barrett*, 162 U. S. 399 (1896), a question of exclusive federal jurisdiction over land leased by the Federal Government to private commercial enterprisers was obviated because the State of New York in its cession statute specifically ceded jurisdiction to the Federal Government only "as long as" the Federal Government put the land to actual military use and "no longer." *Id.* at 400.

**(3) Cases Involving the Survival of "Municipal Law" After Cession of Jurisdiction.**

*Chicago, R. I. & P. R. R. Co.* v. *McGlinn*, 114 U. S. 542 (1885), and *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94 (1940), both held that local rules of private law prevailing at the time of cession of jurisdiction by a state to the Federal Government survive after cession, unless or until they come into conflict with federal laws. But several of the cases cited by petitioners also establish that, absent any explicit grant by Congress or a reservation by the state, the political and regulatory powers of the state do *not* survive cession. *Murray* v. *Joe Gerrick & Co.*, 291 U. S. 315 (1934), *Herken* v. *Glynn*, 151 Kan. 855, 101 P. 2d 946 (1940).

## CONCLUSION.

The decision below is based on well established principles of constitutional law and is in accord with all applicable decisions of this Court. For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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## APPENDIX.

Constitution of the United States, Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.